MOTION FILED
NOV 8 1983

No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

RESPONDENT'S MOTION TO DISMISS WRIT FOR WANT OF JURISDICTION

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COMES NOW the respondent, by and through his attorneys, KARP, GOLDSTEIN & STERN, and moves this Court to dismiss the Writ of Certiorari, previously granted, for want of jurisdiction and as grounds therefore states the following:

1. On October 3, 1983, this Court entered its Order granting the petitioner's Writ of Certiorari.

2. Subsequent to that time, the respondent became aware that this Court, pursuant to 28 U. S. C. § 1257(3), does not have jurisdiction to hear the instant case, which arises from an interlocutory appeal Pre-trial Order in a state criminal case.

3. Attached hereto as Appendix A is a complete set of the Minute Orders entered by the Honorable Phillip F. Roan, District Court Judge, which pertain to the instant case.

These Minute Orders, along with the Appendices attached to the petitioner's Petition for Writ of Certiorari, indicate the following:

a. On October 7, 1982, Judge Roan entered an order requiring the District Attorney to disclose the identity of the confidential informant and, failing that, to suppress evidence seized pursuant to a search warrant. App. to Pet. for Cert. A-18 through A-22.

b. Subsequent thereto, the petitioner took an *interlocutory* appeal to the Colorado Supreme Court pursuant to Colorado Appellate Rules, Rule 4.1, App. to Pet. for Cert. A-25.

c. On February 22, 1983, the Supreme Court of the State of Colorado issued its opinion affirming the decision of the District Court Judge, App. to Pet. for Cert. A-1 through A-10.

d. Subsequent thereto, the petitioner filed a Motion to Recall and to Stay Remittitur to the Supreme Court of the State of Colorado, App. to Pet. for Cert. A-25 through A-27. The Colorado Supreme Court denied this motion, A-34, and the case was returned to the jurisdiction of the District Court.

e. Subsequent thereto, the petitioner filed a Motion to Stay Proceedings before the District Court, App. to Pet. for Cert. A-30 through A-33. This Order was

granted by the District Court Judge, over the objection of the respondent. App. to Pet. for Cert. A-33 through A-34, and Appendix to Motion to Dismiss for Want of Jurisdiction, hereinafter referred to as "Appendix" A-1.

f. Since March 9, 1983, the District Court has scheduled three appearances to review the status of the pending appeal to United States Supreme Court, Appendix A-1.

g. On June 30, 1983, counsel for the respondent registered his continuing objection to the suspended status of the instant case. Appendix A-1.

4. As the chronology set forth above indicates, there has been no final decision or judgment in the state court. Therefore, pursuant to 28 U. S. C. § 1257(3), this Court does not have jurisdiction to hear the instant case.

ARGUMENT

Pursuant to 28 U. S. C. § 1257(3), this Court does not have jurisdiction to hear the instant case in that a final judgment has not been rendered in the state court.

Pursuant to 28 U. S. C. § 1257(3), before the United States Supreme Court may review state court cases by Writ of Certiorari, there must be a "final judgment" from the state courts:

> 'It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court.'

Market Street R.C.O. Railroad Commission, 324 U. S. 548, 551.

Supreme Court Practice, Stern and Gressman (5th Ed. 1978) at 173. Section 1257 reflects Congress' position against "interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy". *Abney v. United States,* 431 U. S. at 657.

The prohibition against interlocutory or "piecemeal" appeals is particularly strong in the criminal context since such appeals are especially inimical to the effective and fair administration of the criminal law. *DiBella v. United States,* 369 U. S. 121 (1962). Moreover, the prohibition as regards state cases—unlike cases from the Federal Courts of Appeal—is statutory not jurisprudential. *Compare* 28 U. S. C. 1254(1) with 28 U. S. C. 1257(3).

Generally speaking, in criminal cases final judgment is entered at the time of sentencing. *Supreme Court Practice, supra,* at 195. *Berman v. United States,* 302 U. S. 211 and *Bateman v. United States,* 429 U. S. 1302. The instant case is still pending before the district court for the state of Colorado and no trial has yet taken place. The petitioner seeks review of a decision by the Colorado Supreme Court on an *interlocutory appeal* taken from the ruling of the district court judge suppressing evidence in response to the petitioner's failure to disclose the identity of a confidential informant. This Court has specifically held that the denial of a motion to suppress evidence is not a "final judgment or decree" for the purpose of establishing jurisdiction. *DiBella v. United States, supra; Cogen v. United States,* 278 U. S. 221 (1929).

In only two criminal cases has this court found an exception to the prohibition against reviewing appeals of

pre-trial orders. *Abney v. United States, supra; Stack v. Boyle,* 342 U. S. 1 (1951). In each case, the court's decision was based upon the "collateral order" exception created in *Cohen v. Beneficial Industrial Loan Corporation,* 377 U. S. 541 (1949). In *Abney v. United States, supra,* this Court summarized the three-step analysis of the "collateral order" exception to the finality rule:

> First, the district court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive.' [337 U. S. at 546].
>
> Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.*
>
> Finally, the decision had involved an important right which would be 'lost, probably irreparably' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*

Abney v. United States, 431 U. S. at 658-659.

The pre-trial motions which formed the basis of the decisions in *Abney v. United States, supra,* and *Stack v. Boyle, supra,* do not support jurisdiction here. To the contrary, the case of *Abney v. United States, supra,* the Court, while ruling that jurisdiction was proper in the context of a Motion to Dismiss for double jeopardy grounds, distinguished that situation from suppression rulings, relying on *DiBella v. United States, supra,* and *Cogen v. United States, supra. Abney v. United States,* 431 U. S. at 661.

Subsequent to its decision in *Abney*, this Court addressed the issue of whether a motion to dismiss on speedy trial grounds fits within the "collateral order" exception to the finality rule. In its decision, this Court strictly limited the applicability of this doctrine in criminal matters. *United States v. McDonald*, 435 U. S. 858 (1968).

In a recent pronouncement this Court again endorsed the general rule that the Court will only hear those state cases in which a final judgment has been rendered which, in the criminal context, means the imposition of sentence. *Flynt v. Ohio*, 451 U. S. 619 (1981).

CONCLUSION

There can be no dispute that the criminal action filed by the petitioner against the respondent is still pending in the state court system. Therefore, there has been no "final judgment or decree" as said term is set forth in 28 U. S. C. § 1257(3) and this court does not have jurisdiction to proceed with the instant case.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

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(303) 861-8580

Attorney for Respondent

APPENDIX "A"

5 82 000025
03-09-83
PFR

PEO. V. ANTONIO NUNEZ
MOTION TO STAY PROCEEDINGS
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT NOT PRESENT. THE COURT HEARD STATEMENTS OF COUNSEL.
ORDER: THE COURT WILL GRANT THE PEOPLE'S MOTION TO STAY PROCEEDINGS. THE MATTER IS CONTINUED FOR REVIEW ON MAY 2, 1983 AT 8:30 A.M. WHICH DATE IS A BOND RETURN DATE FOR THE DEFENDANT.

5 82 000025 05-02-83
05-02-83
PFR

PEO. V. ANTONIO NUNEZ
REVIEW APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: MARY ANN BISHOP

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT ON BOND. THE SUPREME COURT HAS NOT RULED ON THE APPEAL YET.
ORDER: THE MATTER IS CONTINUED FOR REVIEW OF APPEAL STATUS ON JUNE 30, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED.

5 82 000025 07-01-83
06-30-83
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: MARY ANN BISHOP

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT IS ILL IN THE HOSPITAL AND NOT PRESENT. ATD MAKES CONTINUING OBJECTION TO THE SUSPENDED STATUS OF THE CASE.
ORDER: BENCH WARRANT SHALL ISSUE FOR THE ARREST OF THE DEFENDANT, CITATION TO SURETY. STAY OF EXECUTION UNTIL SEPTEMBER 8, 1983 AT 8:30 A.M. THE

5 82 000025 09-15-83
09-08-83
PFR

PEOPLE V. ANTONIO NUNEZ
REVIEW STATUS OF APPEAL AND STAY ON B/W
HON. PHILIP F. ROAN
REP: MARY ANN BISHOP
APPEARING: STEVEN BERNARD, DDA, SHELLY DODGE FOR KENNETH STERN, ESQ WITH THE DEFENDANT WHO IS PRESENT ON BOND.
ORDER: ORDER FOR BENCH WARRANT IS QUASHED AND MATTER CONTINUED TO NOVEMBER 21, 1983 AT 8:30 A.M. FOR REVIEW OF APPEAL. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 10-05-82
10-04-82
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW—STAY BENCH WARRANT
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES
APPEARING: JEFF ROMEO, DDA. KENNETH STERN WITH DEFENDANT ON BOND. THE COURT HAS REVIEWED THE PROPOSED FINDINGS OF FACT SUBMITTED BY COUNSEL FOR THE DEFENDANT.
ORDER: THE BENCH WARRANT IS VACATED. THE COURT WISHES TO ENTER ITS OWN FINDINGS AND WILL DO SO BY FRIDAY OF

THIS WEEK. THE TRIAL DATE OF OCTOBER 27, 1982 AT 9:00 A.M. WILL REMAIN THE BOND RETURN FOR THE DEFENDANT.

5 82 000025 11-01-82
10-27-82
PFR

PEO. V. ANTONIO G. NUNEZ
RE-SET TRIAL
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING JEFF ROMEO, DDA. KENNETH E. STERN WITH DEFENDANT ON BOND. AN INTERLOCUTORY APPEAL HAS BEEN FILED. ORDER: THE MATTER IS SET FOR REVIEW ON JANUARY 14, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED.

5 82 000025 01-19-83
01-14-83
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW—APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: BRUCE LEVIN, DDA. KENNETH STERN, ATD. DEFENDANT ON BOND. THE COURT IS ADVISED THAT THE COURT OF APPEAL HAS NOT MADE A DECISION ON THE APPEAL.
ORDER: THE MATTER IS CONTINUED FOR REVIEW OF APPEAL STATUS UNTIL MAY 2, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED UNTIL THAT TIME.

5 82 000025 03-10-83
03-08-83
PFR

PEO. V. ANTONIO G. NUNEZ
SET PETITION TO SAY PROCEEDINGS
HON. PHILIP F. ROAN
(OFF RECORD)

KENNETH STERNS, ATD TELEPHONED THE COURT ADVISING HE WOULD BE UNABLE TO BE PRESENT 3/10/83 FOR SETTING. STEVE BERNARD HAS NO OBJECTION TO SETTING BY PHONE.
ORDER: THE PEOPLE'S MOTION TO STAY PROCEEDINGS IS SET FOR HEARING MARCH 9, 1983 AT 8:30 A.M. SETTING 3/10/83 IS VACATED.

5 82 000025
06-21-82
PFR

PEO. V. ANTONIO G. NUNEZ
BOND RETURN

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. K. STERN PRESENT WITH THE DEFENDANT ON BOND. ORDER: THIS IS A BOND RETURN DATE ONLY. THE DEFENDANT IS ADVISED THAT THE MATTER HAS BEEN SET FOR HEARING ON MOTION TO SUPPRESS ON JULY 22, 1982 AT 1:30 P.M. AND SET FOR JURY/TRIAL/12 ON OCTOBER 27, 1982 AT 9:00 A.M. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 07-26-82
07-22-82
PFR

PEO. V. ANTONIO G. NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. K. STERN FOR THE DEFENDANT. COUNSEL REQUESTS A CONTINUANCE OF THE MOTION'S HEARING. ORDER: THIS HEARING IS VACATED. THE MATTER IS SET FOR HEARING ON SEPTEMBER 9, 1982 AT 3:00 P.M. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 09-10-82
09-09-82
PFR

PEOPLE V. ANTONIO NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA; KENNETH H. STERN, ATD, W/DEF ON BOND. IN THE MOTION TO RETURN PROPERTY AND HE WOULD ASK THAT THIS MOTION NOT BE HEARD AT THIS TIME.
MOTION FOR DISCLOSURE OF INFORMANT RATHER THAN CONTINUE THIS HEARING PEOPLE WILL WAIVE THE PRESENTATION OF AFFIDAVITS AND ACCEPT COUNSEL'S OFFER OF PROOF IN THEIR STEAD. WITNESSES ARE SEQUESTERED, WITH DON DENOVELLIS AS THE PEOPLE'S ADVISORY WITNESS. THE COURT HEARS THE TESTIMONY OF ANTONIO G. NUNEZ, DON DENOVELLIS AND JEFFREY E. RUETZ. THE COURT FINDS THAT SEAN NUNEZ DOES NOT COMPREHEND THE OATH AND MAY NOT TESTIFY.
FINDINGS AND ORDER: AFTER HEARING THE TESTIMONY OF THE WITNESSES AND THE ARGUMENTS OF COUNSEL THE COURT FINDS THAT DAILEY AND BUENO REQUIRE THE COURT TO ORDER THE PEOPLE TO DISCLOSE THE IDENTITY OF THE INFORMANT. CAUSE IS CONTINUED FOR REVIEW AND SETTING OF THE MOTION TO SUPPRESS ON SEPTEMBER 24, 1982 AT 8:30 A.M. DEF'S BOND WILL CONTINUE UNTIL THAT DATE.

5 82 000025 09-24-82
09-24-82
PFR

PEO. V. ANTONIO NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. KENNETH STERN FOR DEFENDANT. DEFENDANT IS NOT PRESENT BEING IN TRIAL IN DENVER. COUNSEL REQUESTS A RULING. ORDER: A BENCH WARRANT SHALL ISSUE FOR THE ARREST OF THE DEFENDANT. STAY OF EXECUTION UNTIL OCTOBER 4, 1982 AT 8:30 A.M. THE COURT WILL NOT RULE AT THIS TIME ON THE MOTION TO SUPPRESS.

82CR0025

PEOPLE V. ANTONIO G. NUNEZ

02-02-82

Arraignment

Hon. Philip F. Roan
Reporter: Leslie Maes

Appearing: Jeff Romeo, DDA for the People. Jeff Goldstein for Ken Stern, ATD with the Defendant on bond. The Defendant will waive formal reading of the Information. The Defendant tenders a plea of "Not Guilty" to the charge in the Information—Possession of a Controlled Substance, Schedule I. Defendant requested 20 days in which to file motions. The DDA tendered the standard M/Disclosure.
ORDER: The Court will accept the plea of "Not Guilty". The Defendant shall be permitted 20 days in which to file motions. The hearing on the People's M/Disclosure is set for February 11, 1982 at 8:30 a.m. This matter is set for jury trial—12—on June 21, 1982 at 9:00 a.m. The Defendant's bond will continue.

82CR0025

PEOPLE V. ANTONIO GUADALUPE NUNEZ

02-11-82

HON. PHILIP F. ROAN
(off record)

M/Disclosure—The Court contacted Mr. Stern and was advised that the Defendant had confessed the M/Disclosure by letter. A copy would be furnished to the Court.

ORDER: The M/Disclosure is granted and an Order for disclosure is entered subject to constitutional limitations. The review hearing on February 16, 1982 at 9:00 a.m. is vacated.

82CR0025

PEOPLE V. ANTONIO GUADALUPE NUNEZ

02-11-82

M/Disclosure

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

Appearing: Jeff Romeo, DDA for the People. The Court is advised that Mr. Stern called the DDA and confessed the Motion for Disclosure. The Court was not advised.

ORDER: The Court would request that the Clerk contact Mr. Stern and advise him to be in Court on February 16, 1982 at 9:00 a.m. in regard to the M/Disclosure.

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5 82 000025 05-19-82

05-19-82

PFR

PEO. V. ANTONIO G. NUNEZ

HON. PHILIP F. ROAN
(off record)

APPEARING: JEFF ROMEO, DDA. KENNETH STERN, ATD. COUNSEL AGREES TO DOCKET THIS MATTER FOR SETTING OF DEFENDANT'S MOTION TO SUPPRESS.

ORDER: THIS MATTER IS PLACED ON THE DOCKET FOR SETTING OF DEFENDANT'S MOTION TO SUPPRESS ON MAY 24, 1982 at 1:30 P.M.

5 82 000025 05-26-82
05-24-82
PFR

PEO. V. ANTONIO G. NUNEZ
SET/MOTION SUPPRESS
HON. MICHAEL A. OBERMEYER
REPORTER: WILLIAM WOODS
APPEARING: JEFF ROMEO, DDA. KENNETH STERN, ATD. DEFENDANT NOT PRESENT. THE COURT IS ADVISED THAT THE DEFENDANT WISHES TO WAIVE HIS RIGHT TO A SPEEDY TRIAL AND VACATE THE JURY TRIAL CURRENTLY SET ON JUNE 21, 1982. COUNSEL FOR DEFENDANT REQUESTS THAT HIS MOTION TO SUPPRESS BE SET FOR HEARING:
ORDER: THE COURT ORDERS THE DEFENDANT TO SUBMIT A WRITTEN WAIVER TO RIGHT OF SPEEDY TRIAL WITHIN (7) DAYS. THE JURY TRIAL SET ON JUNE 21, 1982 WILL BE VACATED AND THE CAUSE RE-SET ON OCTOBER 27, 1982 AT 9:00 A.M. MOTION TO SUPPRESS IS SET FOR HEARING ON JULY 22, 1982 AT 1:30 P.M. JUNE 21, 1982 AT 9:00 A.M. WILL REMAIN A BOND RETURN DATE FOR THE DEFENDANT UNLESS HE APPEARS BEFORE THE COURT BEFORE THAT TIME TO BE ADVISED OF NEW SETTING DATES.